SECOND DIVISION

[G.R. No. 149734. November 19, 2004]

DR. DANIEL VAZQUEZ and MA. LUIZA M. VAZQUEZ, *petitioners vs.* AYALA CORPORATION, *respondent.*

D E C I S I O N

TINGA, *J.*:

The rise in value of four lots in one of the countrys prime residential developments, Ayala Alabang Village in Muntinlupa City, over a period of six (6) years only, represents big money. The huge price difference lies at the heart of the present controversy. Petitioners insist that the lots should be sold to them at 1984 prices while respondent maintains that the prevailing market price in 1990 should be the selling price.

Dr. Daniel Vazquez and Ma. Luisa Vazquez[1] filed this *Petition for Review on Certiorari*[2] dated October 11, 2001 assailing the *Decision*[3] of the Court of Appeals dated September 6, 2001 which reversed the *Decision*[4] of the Regional Trial Court (RTC) and dismissed their complaint for specific performance and damages against Ayala Corporation.

Despite their disparate rulings, the RTC and the appellate court agree on the following antecedents:[5]

On April 23, 1981, spouses Daniel Vasquez and Ma. Luisa M. Vasquez (hereafter, Vasquez spouses) entered into a Memorandum of Agreement (MOA) with Ayala Corporation (hereafter, AYALA) with AYALA buying from the Vazquez spouses, all of the latters shares of stock in Conduit Development, Inc. (hereafter, Conduit). The main asset of Conduit was a 49.9 hectare property in Ayala Alabang, Muntinlupa, which was then being developed by Conduit under a development plan where the land was divided into Villages 1, 2 and 3 of the Don Vicente Village. The development was then being undertaken for Conduit by G.P. Construction and Development Corp. (hereafter, GP Construction).

Under the MOA, Ayala was to develop the entire property, less what was defined as the Retained Area consisting of 18,736 square meters. This Retained Area was to be retained by the Vazquez spouses. The area to be developed by Ayala was called the Remaining Area. In this Remaining Area were 4 lots adjacent to the Retained Area and Ayala agreed to offer these lots for sale to the Vazquez spouses at the prevailing price at the time of purchase. The relevant provisions of the MOA on this point are:

5.7. The BUYER hereby commits that it will develop the Remaining Property into a first class residential subdivision of the same class as its New Alabang Subdivision, and that it intends to complete the first phase under its amended development plan within three (3) years from the date of this Agreement. x x x

5.15. The BUYER agrees to give the SELLERS a first option to purchase four developed lots next to the Retained Area at the prevailing market price at the time of the purchase.

The parties are agreed that the development plan referred to in paragraph 5.7 is not Conduits development plan, but Ayalas amended development plan which was still to be formulated as of the time of the MOA. While in the Conduit plan, the 4 lots to be offered for sale to the Vasquez Spouses were in the

first phase thereof or Village 1, in the Ayala plan which was formulated a year later, it was in the third phase, or Phase II-c.

Under the MOA, the Vasquez spouses made several express warranties, as follows:

3.1. The SELLERS shall deliver to the BUYER:

xxx

3.1.2. The true and complete list, certified by the Secretary and Treasurer of the Company showing:

xxx

D. A list of all persons and/or entities with whom the Company has pending contracts, if any.

xxx

3.1.5. Audited financial statements of the Company as at Closing date.

4. Conditions Precedent

All obligations of the BUYER under this Agreement are subject to fulfillment prior to or at the Closing, of the following conditions:

4.1. **The representations and warranties by the SELLERS contained in this Agreement shall be true and correct at the time of Closing as though such representations and warranties were made at such time;** and

xxx

6. Representation and Warranties by the SELLERS

The SELLERS jointly and severally represent and warrant to the BUYER that at the time of the execution of this Agreement and at the Closing:

xxx

6.2.3. There are no actions, suits or proceedings pending, or to the knowledge of the SELLERS, threatened against or affecting the SELLERS with respect to the Shares or the Property; and

7. Additional Warranties by the SELLERS

7.1. With respect to the Audited Financial Statements required to be submitted at Closing in accordance with Par. 3.1.5 above, the SELLER jointly and severally warrant to the BUYER that:

7.1.1 The said Audited Financial Statements shall show that on the day of Closing, the Company shall own the Remaining Property, free from all liens and encumbrances and that **the Company shall have no obligation to any party except for billings payable to GP Construction & Development Corporation and advances made by Daniel Vazquez for which BUYER shall be responsible in accordance with Par. 2 of this Agreement.**

7.1.2 **Except to the extent reflected or reserved in the Audited Financial Statements of the Company as of Closing, and those disclosed to BUYER, the Company as of the date thereof, has no liabilities of any nature whether accrued, absolute, contingent or otherwise,** including, without limitation, tax liabilities due or to become due and whether incurred in respect of or measured in respect of the Companys income prior to Closing or arising out of transactions or state of facts existing prior thereto.

7.2 **SELLERS do not know or have no reasonable ground to know of any basis for any assertion against the Company as at closing or any liability of any nature and in any amount not fully reflected or reserved against such Audited Financial Statements referred to above, and those disclosed to BUYER.**

xxx xxx xxx

7.6.3 **Except as otherwise disclosed to the BUYER in writing on or before the Closing, the Company is not engaged in or a party to, or to the best of the knowledge of the SELLERS, threatened with, any legal action or other proceedings before any court or administrative body,** nor do the SELLERS know or have reasonable grounds to know of any basis for any such action or proceeding or of any governmental investigation relative to the Company.

7.6.4 To the knowledge of the SELLERS, **no default or breach exists in the due performance and observance by the Company of any term, covenant or condition of any instrument or agreement to which the company is a party or by which it is bound, and no condition exists which, with notice or lapse of time or both, will constitute such default or breach.**

After the execution of the MOA, Ayala caused the suspension of work on Village 1 of the Don Vicente Project. Ayala then received a letter from one Maximo Del Rosario of Lancer General Builder Corporation informing Ayala that he was claiming the amount of P1,509,558.80 as the subcontractor of G.P. Construction...

G.P. Construction not being able to reach an amicable settlement with Lancer, on March 22, 1982, Lancer sued G.P. Construction, Conduit and Ayala in the then Court of First Instance of Manila in Civil Case No. 82-8598. G.P. Construction in turn filed a cross-claim against Ayala. G.P. Construction and Lancer both tried to enjoin Ayala from undertaking the development of the property. The suit was terminated only on February 19, 1987, when it was dismissed with prejudice after Ayala paid both Lancer and GP Construction the total of P4,686,113.39.

Taking the position that Ayala was obligated to sell the 4 lots adjacent to the Retained Area within 3 years from the date of the MOA, the Vasquez spouses sent several reminder letters of the approaching so-called deadline. However, no demand after April 23, 1984, was ever made by the Vasquez spouses for Ayala to sell the 4 lots. On the contrary, one of the letters signed by their authorized agent, Engr. Eduardo Turla, categorically stated that they expected development of Phase 1 to be completed by February 19, 1990, three years from the settlement of the legal problems with the previous contractor.

By early 1990 Ayala finished the development of the vicinity of the 4 lots to be offered for sale. The four lots were then offered to be sold to the Vasquez spouses at the prevailing price in 1990. This was rejected by the Vasquez spouses who wanted to pay at 1984 prices, thereby leading to the suit below.

After trial, the court a quo rendered its decision, the dispositive portion of which states:

THEREFORE, judgment is hereby rendered in favor of plaintiffs and against defendant, ordering defendant to sell to plaintiffs the relevant lots described in the Complaint in the Ayala Alabang Village at the price of ₱460.00 per square meter amounting to ₱1,349,540.00; ordering defendant to reimburse to plaintiffs attorneys fees in the sum of ₱200,000.00 and to pay the cost of the suit.

In its decision, the court *a quo* concluded that the Vasquez spouses were not obligated to disclose the potential claims of GP Construction, Lancer and Del Rosario; Ayalas accountants should have opened the records of Conduit to find out all claims; the warranty against suit is with respect to the shares of the Property and the Lancer suit does not affect the shares of stock sold to Ayala; Ayala was obligated to develop within 3 years; to say that Ayala was under no obligation to follow a time frame was to put the Vasquezes at Ayalas mercy; Ayala did not develop because of a slump in the real estate market; the MOA was drafted and prepared by the AYALA who should suffer its ambiguities; the option to purchase the 4 lots is valid because it was supported by consideration as the option is incorporated in the MOA where the parties had prestations to each other. [Emphasis supplied]

Ayala Corporation filed an appeal, alleging that the trial court erred in holding that petitioners did not breach their warranties under the MOA[6] dated April 23, 1981; that it was obliged to develop the land where the four (4) lots subject of the option to purchase are located within three (3) years from the date of the MOA; that it was in delay; and that the option to purchase was valid because it was incorporated in the MOA and the consideration therefor was the commitment by Ayala Corporation to petitioners embodied in the MOA.

As previously mentioned, the Court of Appeals reversed the RTC *Decision.* According to the appellate court, Ayala Corporation was never informed beforehand of the existence of the Lancer claim. In fact, Ayala Corporation got a copy of the Lancer subcontract only on May 29, 1981 from G.P. Constructions lawyers. The Court of Appeals thus held that petitioners violated their warranties under the MOA when they failed to disclose Lancers claims. Hence, even conceding that Ayala Corporation was obliged to develop and sell the four (4) lots in question within three (3) years from the date of the MOA, the obligation was suspended during the pendency of the case filed by Lancer.

Interpreting the MOAs paragraph 5.7 above-quoted, the appellate court held that Ayala Corporation committed to develop the first phase of its own amended development plan and not Conduits development plan. Nowhere does the MOA provide that Ayala Corporation shall follow Conduits development plan nor is Ayala Corporation prohibited from changing the sequence of the phases of the property it will develop.

Anent the question of delay, the Court of Appeals ruled that there was no delay as petitioners never made a demand for Ayala Corporation to sell the subject lots to them. According to the appellate court, what petitioners sent were mere reminder letters the last of which was dated prior to April 23, 1984 when the obligation was not yet demandable. At any rate, the Court of Appeals found that petitioners in fact waived the three (3)-year period when they sent a letter through their agent, Engr. Eduardo Turla, stating that they expect that the development of Phase I will be completed by 19 February 1990, three years from the settlement of the legal problems with the previous contractor.[7]

The appellate court likewise ruled that paragraph 5.15 above-quoted is not an option contract but a right of first refusal there being no separate consideration therefor. Since petitioners refused Ayala Corporations offer to sell the subject lots at the reduced 1990 price of ₱5,000.00 per square meter, they have effectively waived their right to buy the same.

In the instant *Petition,* petitioners allege that the appellate court erred in ruling that they violated their warranties under the MOA; that Ayala Corporation was not obliged to develop the Remaining Property within three (3) years from the execution of the MOA; that Ayala was not in delay; and that paragraph 5.15 of the MOA is a mere right of first refusal. Additionally, petitioners insist that the Court should review the factual findings of the Court of Appeals as they are in conflict with those of the trial court.

Ayala Corporation filed a *Comment on the Petition*[8] dated March 26, 2002, contending that the petition raises questions of fact and seeks a review of evidence which is within the domain of the Court of Appeals. Ayala Corporation maintains that the subcontract between GP Construction, with whom Conduit contracted for the development of the property under a Construction Contract dated October 10, 1980, and Lancer was not disclosed by petitioners during the negotiations. Neither was the liability for Lancers claim included in the Audited Financial Statements submitted by petitioners after the signing of the MOA. These justify the conclusion that petitioners breached their warranties under the afore-quoted paragraphs of the MOA. Since the Lancer suit ended only in February 1989, the three (3)-year period within which Ayala Corporation committed to develop the property should only be counted thence. Thus, when it offered the subject lots to petitioners in 1990, Ayala Corporation was not yet in delay.

In response to petitioners contention that there was no action or proceeding against them at the time of the execution of the MOA on April 23, 1981, Ayala Corporation avers that the facts and circumstances which gave rise to the Lancer claim were already extant then. Petitioners warranted

that their representations under the MOA shall be true and correct at the time of Closing which shall take place within four (4) weeks from the signing of the MOA.[9] Since the MOA was signed on April 23, 1981, Closing was approximately the third week of May 1981. Hence, Lancers claims, articulated in a letter which Ayala Corporation received on May 4, 1981, are among the liabilities warranted against under paragraph 7.1.2 of the MOA.

Moreover, Ayala Corporation asserts that the warranties under the MOA are not just against suits but against all kinds of liabilities not reflected in the Audited Financial Statements. It cannot be faulted for relying on the express warranty that except for billings payable to GP Construction and advances made by petitioner Daniel Vazquez in the amount of ₱38,766.04, Conduit has no other liabilities. Hence, petitioners cannot claim that Ayala Corporation should have examined and investigated the Audited Financial Statements of Conduit and should now assume all its obligations and liabilities including the Lancer suit and the cross-claim of GP Construction.

Furthermore, Ayala Corporation did not make a commitment to complete the development of the first phase of the property within three (3) years from the execution of the MOA. The provision refers to a mere declaration of intent to develop the first phase of its (Ayala Corporations) own development plan and not Conduits. True to its intention, Ayala Corporation did complete the development of the first phase (Phase II-A) of its amended development plan within three (3) years from the execution of the MOA. However, it is not obliged to develop the third phase (Phase II-C) where the subject lots are located within the same time frame because there is no contractual stipulation in the MOA therefor. It is free to decide on its own the period for the development of Phase II-C. If petitioners wanted to impose the same three (3)-year timetable upon the third phase of the amended development plan, they should have filed a suit to fix the time table in accordance with Article 1197[10] of the Civil Code. Having failed to do so, Ayala Corporation cannot be declared to have been in delay.

Ayala Corporation further contends that no demand was made on it for the performance of its alleged obligation. The letter dated October 4, 1983 sent when petitioners were already aware of the Lancer suit did not demand the delivery of the subject lots by April 23, 1984. Instead, it requested Ayala Corporation to keep petitioners posted on the status of the case. Likewise, the letter dated March 4, 1984 was merely an inquiry as to the date when the development of Phase 1 will be completed. More importantly, their letter dated June 27, 1988 through Engr. Eduardo Turla expressed petitioners expectation that Phase 1 will be completed by February 19, 1990.

Lastly, Ayala Corporation maintains that paragraph 5.15 of the MOA is a right of first refusal and not an option contract.

Petitioners filed their *Reply*[11] dated August 15, 2002 reiterating the arguments in their *Petition* and contending further that they did not violate their warranties under the MOA because the case was filed by Lancer only on April 1, 1982, eleven (11) months and eight (8) days after the signing of the MOA on April 23, 1981. Ayala Corporation admitted that it received Lancers claim before the Closing date. It therefore had all the time to rescind the MOA. Not having done so, it can be concluded that Ayala Corporation itself did not consider the matter a violation of petitioners warranty.

Moreover, petitioners submitted the Audited Financial Statements of Conduit and allowed an acquisition audit to be conducted by Ayala Corporation. Thus, the latter bought Conduit with open eyes.

Petitioners also maintain that they had no knowledge of the impending case against Conduit at the time of the execution of the MOA. Further, the MOA makes Ayala Corporation liable for the payment of all billings of GP Construction. Since Lancers claim was actually a claim against GP Construction being its sub-contractor, it is Ayala Corporation and not petitioners which is liable.

Likewise, petitioners aver that although Ayala Corporation may change the sequence of its development plan, it is obliged under the MOA to develop the entire area where the subject lots are located in three (3) years.

They also assert that demand was made on Ayala Corporation to comply with their obligation under the MOA. Apart from their reminder letters dated January 24, February 18 and March 5, 1984, they also sent a letter dated March 4, 1984 which they claim is a categorical demand for Ayala Corporation to comply with the provisions of the MOA.

The parties were required to submit their respective memoranda in the *Resolution*[12] dated November 18, 2002. In compliance with this directive, petitioners submitted their *Memorandum*[13] dated February 14, 2003 on even date, while Ayala Corporation filed its *Memorandum*[14] dated February 14, 2003 on February 17, 2003.

We shall first dispose of the procedural question raised by the instant petition.

It is well-settled that the jurisdiction of this Court in cases brought to it from the Court of Appeals by way of petition for review under Rule 45 is limited to reviewing or revising errors of law imputed to it, its findings of fact being conclusive on this Court as a matter of general principle. However, since in the instant case there is a conflict between the factual findings of the trial court and the appellate court, particularly as regards the issues of breach of warranty, obligation to develop and incurrence of delay, we have to consider the evidence on record and resolve such factual issues as an exception to the general rule.[15] In any event, the submitted issue relating to the categorization of the right to purchase granted to petitioners under the MOA is legal in character.

The next issue that presents itself is whether petitioners breached their warranties under the MOA when they failed to disclose the Lancer claim. The trial court declared they did not; the appellate court found otherwise.

Ayala Corporation summarizes the clauses of the MOA which petitioners allegedly breached when they failed to disclose the Lancer claim:

a) Clause 7.1.1. that Conduit shall not be obligated to anyone except to GP Construction for P38,766.04, and for advances made by Daniel Vazquez;

b) Clause 7.1.2. that except as reflected in the audited financial statements Conduit had no other liabilities whether accrued, absolute, contingent or otherwise;

c) Clause 7.2. that there is no basis for any assertion against Conduit of any liability of any value not reflected or reserved in the financial statements, and those disclosed to Ayala;

d) Clause 7.6.3. that Conduit is not threatened with any legal action or other proceedings; and

e) Clause 7.6.4. that Conduit had not breached any term, condition, or covenant of any instrument or agreement to which it is a party or by which it is bound.[16]

The Court is convinced that petitioners did not violate the foregoing warranties.

The exchanges of communication between the parties indicate that petitioners substantially apprised Ayala Corporation of the Lancer claim or the possibility thereof during the period of negotiations for the sale of Conduit.

In a letter[17] dated March 5, 1984, petitioner Daniel Vazquez reminded Ayala Corporations Mr. Adolfo Duarte (Mr. Duarte) that prior to the completion of the sale of Conduit, Ayala Corporation asked for and was given information that GP Construction sub-contracted, presumably to Lancer, a greater percentage of the project than it was allowed. Petitioners gave this information to Ayala Corporation because the latter intimated a desire to break the contract of Conduit with GP. Ayala Corporation did not deny this. In fact, Mr. Duartes letter[18] dated March 6, 1984 indicates that Ayala Corporation had knowledge of the Lancer subcontract prior to its acquisition of Conduit. Ayala Corporation even

admitted that it tried to explorelegal basis to discontinue the contract of Conduit with GP but found this not feasible when information surfaced about the tacit consent of Conduit to the sub-contracts of GP with Lancer.

At the latest, Ayala Corporation came to know of the Lancer claim before the date of Closing of the MOA. Lancers letter[19] dated April 30, 1981 informing Ayala Corporation of its unsettled claim with GP Construction was received by Ayala Corporation on May 4, 1981, well before the Closing[20] which occurred four (4) weeks after the date of signing of the MOA on April 23, 1981, or on May 23, 1981.

The full text of the pertinent clauses of the MOA quoted hereunder likewise indicate that certain matters pertaining to the liabilities of Conduit were disclosed by petitioners to Ayala Corporation although the specifics thereof were no longer included in the MOA:

7.1.1 The said Audited Financial Statements shall show that on the day of Closing, the Company shall own the Remaining Property, free from all liens and encumbrances and that the Company shall have no obligation to any party except for billings payable to GP Construction & Development Corporation and advances made by Daniel Vazquez for which BUYER shall be responsible in accordance with Paragraph 2 of this Agreement.

7.1.2 **Except to the extent reflected or reserved in the Audited Financial Statements of the Company as of Closing, and those disclosed to BUYER,** the Company as of the date hereof, has no liabilities of any nature whether accrued, absolute, contingent or otherwise, including, without limitation, tax liabilities due or to become due and whether incurred in respect of or measured in respect of the Companys income prior to Closing or arising out of transactions or state of facts existing prior thereto.

7.2 SELLERS do not know or have no reasonable ground to know of any basis for any assertion against the Company as at Closing of any liability of any nature and in any amount not fully reflected or reserved against such Audited Financial Statements referred to above, **and those disclosed to BUYER.**

xxx xxx xxx

7.6.3 **Except as otherwise disclosed to the BUYER in writing on or before the Closing,** the Company is not engaged in or a party to, or to the best of the knowledge of the SELLERS, threatened with, any legal action or other proceedings before any court or administrative body, nor do the SELLERS know or have reasonable grounds to know of any basis for any such action or proceeding or of any governmental investigation relative to the Company.

7.6.4 To the knowledge of the SELLERS, no default or breach exists in the due performance and observance by the Company of any term, covenant or condition of any instrument or agreement to which the Company is a party or by which it is bound, and no condition exists which, with notice or lapse of time or both, will constitute such default or breach.[21] [Emphasis supplied]

Hence, petitioners warranty that Conduit is not engaged in, a party to, or threatened with any legal action or proceeding is qualified by Ayala Corporations actual knowledge of the Lancer claim which was disclosed to Ayala Corporation before the Closing.

At any rate, Ayala Corporation bound itself to pay all billings payable to GP Construction and the advances made by petitioner Daniel Vazquez. Specifically, under paragraph 2 of the MOA referred to in paragraph 7.1.1, Ayala Corporation undertook responsibility for the payment of all billings of the contractor GP Construction & Development Corporation after the first billing and any payments made by the company and/or SELLERS shall be reimbursed by BUYER on closing which advances to date is ₱1,159,012.87.[22]

The billings knowingly assumed by Ayala Corporation necessarily include the Lancer claim for which GP Construction is liable. Proof of this is Ayala Corporations letter[23] to GP Construction dated before Closing on May 4, 1981, informing the latter of Ayala Corporations receipt of the Lancer claim

embodied in the letter dated April 30, 1981, acknowledging that it is taking over the contractual responsibilities of Conduit, and requesting copies of all sub-contracts affecting the Conduit property. The pertinent excerpts of the letter read:

In this connection, we wish to inform you that this morning we received a letter from Mr. Maximo D. Del Rosario, President of Lancer General Builders Corporation apprising us of the existence of subcontracts that they have with your corporation. They have also furnished us with a copy of their letter to you dated 30 April 1981.

Since we are taking over the contractual responsibilities of Conduit Development, Inc., we believe that it is necessary, at this point in time, that you furnish us with copies of all your subcontracts affecting the property of Conduit, not only with Lancer General Builders Corporation, but all subcontracts with other parties as well[24]

Quite tellingly, Ayala Corporation even attached to its *Pre-Trial Brief*[25] dated July 9, 1992 a copy of the letter[26] dated May 28, 1981 of GP Constructions counsel addressed to Conduit furnishing the latter with copies of all sub-contract agreements entered into by GP Construction. Since it was addressed to Conduit, it can be presumed that it was the latter which gave Ayala Corporation a copy of the letter thereby disclosing to the latter the existence of the Lancer sub-contract.

The ineluctable conclusion is that petitioners did not violate their warranties under the MOA. The Lancer sub-contract and claim were substantially disclosed to Ayala Corporation before the Closing date of the MOA. Ayala Corporation cannot disavow knowledge of the claim.

Moreover, while in its correspondence with petitioners, Ayala Corporation did mention the filing of the Lancer suit as an obstacle to its development of the property, it never actually brought up nor sought redress for petitioners alleged breach of warranty for failure to disclose the Lancer claim until it filed its *Answer*[27] dated February 17, 1992.

We now come to the correct interpretation of paragraph 5.7 of the MOA. Does this paragraph express a commitment or a mere intent on the part of Ayala Corporation to develop the property within three (3) years from date thereof? Paragraph 5.7 provides:

5.7. The BUYER hereby commits that it will develop the Remaining Property into a first class residential subdivision of the same class as its New Alabang Subdivision, and that it intends to complete the first phase under its amended development plan within three (3) years from the date of this Agreement.[28]

Notably, while the first phrase of the paragraph uses the word commits in reference to the development of the Remaining Property into a first class residential subdivision, the second phrase uses the word intends in relation to the development of the first phase of the property within three (3) years from the date of the MOA. The variance in wording is significant. While commit[29] connotes a pledge to do something, intend[30] merely signifies a design or proposition.

Atty. Leopoldo Francisco, former Vice President of Ayala Corporations legal division who assisted in drafting the MOA, testified:

COURT

You only ask what do you mean by that intent. Just answer on that point.

ATTY. BLANCO

Dont talk about standard.

WITNESS

A Well, the word intent here, your Honor, was used to emphasize the tentative character of the period of development because it will be noted that the sentence refers to and I quote to complete the first phase under its amended development plan within three (3) years from the date of this agreement,

at the time of the execution of this agreement, your Honor. That amended development plan was not yet in existence because the buyer had manifested to the seller that the buyer could amend the subdivision plan originally belonging to the seller to conform with its own standard of development and second, your Honor, (interrupted)[31]

It is thus unmistakable that this paragraph merely expresses an intention on Ayala Corporations part to complete the first phase under its amended development plan within three (3) years from the execution of the MOA. Indeed, this paragraph is so plainly worded that to misunderstand its import is deplorable.

More focal to the resolution of the instant case is paragraph 5.7s clear reference to the first phase of Ayala Corporations amended development plan as the subject of the three (3)-year intended timeframe for development. Even petitioner Daniel Vazquez admitted on cross-examination that the paragraph refers not to Conduits but to Ayala Corporations development plan which was yet to be formulated when the MOA was executed:

Q: Now, turning to Section 5.7 of this Memorandum of Agreement, it is stated as follows: The Buyer hereby commits that to develop the remaining property into a first class residential subdivision of the same class as New Alabang Subdivision, and that they intend to complete the first phase under its amended development plan within three years from the date of this agreement.

Now, my question to you, Dr. Vasquez is that there is no dispute that the amended development plan here is the amended development plan of Ayala?

A: Yes, sir.

Q: In other words, it is not Exhibit D-5 which is the original plan of Conduit?

A: No, it is not.

Q: This Exhibit D-5 was the plan that was being followed by GP Construction in 1981?

A: Yes, sir.

Q: And point of fact during your direct examination as of the date of the agreement, this amended development plan was still to be formulated by Ayala?

A: Yes, sir.[32]

As correctly held by the appellate court, this admission is crucial because while the subject lots to be sold to petitioners were in the first phase of the Conduit development plan, they were in the third or last phase of the Ayala Corporation development plan. Hence, even assuming that paragraph 5.7 expresses a commitment on the part of Ayala Corporation to develop the first phase of its amended development plan within three (3) years from the execution of the MOA, there was no parallel commitment made as to the timeframe for the development of the third phase where the subject lots are located.

Lest it be forgotten, the point of this petition is the alleged failure of Ayala Corporation to offer the subject lots for sale to petitioners within three (3) years from the execution of the MOA. It is not that Ayala Corporation committed or intended to develop the first phase of its amended development plan within three (3) years. Whether it did or did not is actually beside the point since the subject lots are not located in the first phase anyway.

We now come to the issue of default or delay in the fulfillment of the obligation.

Article 1169 of the Civil Code provides:

Art. 1169. Those obliged to deliver or to do something incur in delay from the time the obligee judicially or extrajudicially demands from them the fulfillment of their obligation.

However, the demand by the creditor shall not be necessary in order that delay may exist:

(1) When the obligation or the law expressly so declares; or

(2) When from the nature and the circumstances of the obligation it appears that the designation of the time when the thing is to be delivered or the service is to be rendered was a controlling motive for the establishment of the contract; or

(3) When demand would be useless, as when the obligor has rendered it beyond his power to perform.

In reciprocal obligations, neither party incurs in delay if the other does not comply or is not ready to comply in a proper manner with what is incumbent upon him. From the moment one of the parties fulfills his obligation, delay by the other begins.

In order that the debtor may be in default it is necessary that the following requisites be present: (1) that the obligation be demandable and already liquidated; (2) that the debtor delays performance; and (3) that the creditor requires the performance judicially or extrajudicially.[33]

Under Article 1193 of the Civil Code, obligations for whose fulfillment a day certain has been fixed shall be demandable only when that day comes. However, no such day certain was fixed in the MOA. Petitioners, therefore, cannot demand performance after the three (3) year period fixed by the MOA for the development of the first phase of the property since this is not the same period contemplated for the development of the subject lots. Since the MOA does not specify a period for the development of the subject lots, petitioners should have petitioned the court to fix the period in accordance with Article 1197[34] of the Civil Code. As no such action was filed by petitioners, their complaint for specific performance was premature, the obligation not being demandable at that point. Accordingly, Ayala Corporation cannot likewise be said to have delayed performance of the obligation.

Even assuming that the MOA imposes an obligation on Ayala Corporation to develop the subject lots within three (3) years from date thereof, Ayala Corporation could still not be held to have been in delay since no demand was made by petitioners for the performance of its obligation.

As found by the appellate court, petitioners letters which dealt with the three (3)-year timetable were all dated prior to April 23, 1984, the date when the period was supposed to expire. In other words, the letters were sent before the obligation could become legally demandable. Moreover, the letters were mere reminders and not categorical demands to perform. More importantly, petitioners waived the three (3)-year period as evidenced by their agent, Engr. Eduardo Turlas letter to the effect that petitioners agreed that the three (3)-year period should be counted from the termination of the case filed by Lancer. The letter reads in part:

I. Completion of Phase I

As per the memorandum of Agreement also dated April 23, 1981, it was undertaken by your goodselves to complete the development of Phase I within three (3) years. Dr. & Mrs. Vazquez were made to understand that you were unable to accomplish this because of legal problems with the previous contractor. These legal problems were resolved as of February 19, 1987, and Dr. & Mrs. Vazquez therefore expect that the development of Phase I will be completed by February 19, 1990, three years from the settlement of the legal problems with the previous contractor. The reason for this is, as you know, that security-wise, Dr. & Mrs. Vazquez have been advised not to construct their residence till the surrounding area (which is Phase I) is developed and occupied. They have been anxious to build their residence for quite some time now, and would like to receive assurance from your goodselves regarding this, in compliance with the agreement.

II. Option on the adjoining lots

We have already written your goodselves regarding the intention of Dr. & Mrs. Vazquez to exercise their option to purchase the two lots on each side (a total of 4 lots) adjacent to their Retained Area. They are concerned that although over a year has elapsed since the settlement of the legal problems, you have not presented them with

the size, configuration, etc. of these lots. They would appreciate being provided with these at your earliest convenience.[35]

Manifestly, this letter expresses not only petitioners acknowledgement that the delay in the development of Phase I was due to the legal problems with GP Construction, but also their acquiescence to the completion of the development of Phase I at the much later date of February 19, 1990. More importantly, by no stretch of semantic interpretation can it be construed as a categorical demand on Ayala Corporation to offer the subject lots for sale to petitioners as the letter merely articulates petitioners desire to exercise their option to purchase the subject lots and concern over the fact that they have not been provided with the specifications of these lots.

The letters of petitioners children, Juan Miguel and Victoria Vazquez, dated January 23, 1984[36] and February 18, 1984[37] can also not be considered categorical demands on Ayala Corporation to develop the first phase of the property within the three (3)-year period much less to offer the subject lots for sale to petitioners. The letter dated January 23, 1984 reads in part:

You will understand our interest in the completion of the roads to our property, since we cannot develop it till you have constructed the same. Allow us to remind you of our Memorandum of Agreement, as per which you committed to develop the roads to our property as per the original plans of the company, and that

1. The back portion should have been developed before the front portion which has not been the case.

2. The whole project front and back portions be completed by 1984.[38]

The letter dated February 18, 1984 is similarly worded. It states:

In this regard, we would like to remind you of Articles 5.7 and 5.9 of our Memorandum of Agreement which states respectively:[39]

Even petitioner Daniel Vazquez letter[40] dated March 5, 1984 does not make out a categorical demand for Ayala Corporation to offer the subject lots for sale on or before April 23, 1984. The letter reads in part:

and that we expect from your goodselves compliance with our Memorandum of Agreement, and a definite date as to when the road to our property and the development of Phase I will be completed.[41]

At best, petitioners letters can only be construed as mere reminders which cannot be considered demands for performance because it must appear that the tolerance or benevolence of the creditor must have ended.[42]

The petition finally asks us to determine whether paragraph 5.15 of the MOA can properly be construed as an option contract or a right of first refusal. Paragraph 5.15 states:

5.15 The BUYER agrees to give the SELLERS first option to purchase four developed lots next to the Retained Area at the prevailing market price at the time of the purchase.[43]

The Court has clearly distinguished between an option contract and a right of first refusal. An option is a preparatory contract in which one party grants to another, for a fixed period and at a determined price, the privilege to buy or sell, or to decide whether or not to enter into a principal contract. It binds the party who has given the option not to enter into the principal contract with any other person during the period designated, and within that period, to enter into such contract with the one to whom the option was granted, if the latter should decide to use the option. It is a separate and

distinct contract from that which the parties may enter into upon the consummation of the option. It must be supported by consideration.[44]

In a right of first refusal, on the other hand, while the object might be made determinate, the exercise of the right would be dependent not only on the grantors eventual intention to enter into a binding juridical relation with another but also on terms, including the price, that are yet to be firmed up.[45]

Applied to the instant case, paragraph 5.15 is obviously a mere right of first refusal and not an option contract. Although the paragraph has a definite object, *i.e.,* the sale of subject lots, the period within which they will be offered for sale to petitioners and, necessarily, the price for which the subject lots will be sold are not specified. The phrase at the prevailing market price at the time of the purchase connotes that there is no definite period within which Ayala Corporation is bound to reserve the subject lots for petitioners to exercise their privilege to purchase. Neither is there a fixed or determinable price at which the subject lots will be offered for sale. The price is considered certain if it may be determined with reference to another thing certain or if the determination thereof is left to the judgment of a specified person or persons.[46]

Further, paragraph 5.15 was inserted into the MOA to give petitioners the first crack to buy the subject lots at the price which Ayala Corporation would be willing to accept when it offers the subject lots for sale. It is not supported by an independent consideration. As such it is **not** governed by Articles 1324 and 1479 of the Civil Code, *viz:*

Art. 1324. When the offeror has allowed the offeree a certain period to accept, the offer may be withdrawn at any time before acceptance by communicating such withdrawal, except when the option is founded upon a consideration, as something paid or promised.

Art. 1479. A promise to buy and sell a determinate thing for a price certain is reciprocally demandable.

An accepted unilateral promise to buy or to sell a determinate thing for a price certain is binding upon the promissor if the promise is supported by a consideration distinct from the price.

Consequently, the offer may be withdrawn anytime by communicating the withdrawal to the other party.[47]

In this case, Ayala Corporation offered the subject lots for sale to petitioners at the price of ₱6,500.00/square meter, the prevailing market price for the property when the offer was made on June 18, 1990.[48] Insisting on paying for the lots at the prevailing market price in 1984 of ₱460.00/square meter, petitioners rejected the offer. Ayala Corporation reduced the price to ₱5,000.00/square meter but again, petitioners rejected the offer and instead made a counter-offer in the amount of ₱2,000.00/square meter.[49] Ayala Corporation rejected petitioners counter-offer. With this rejection, petitioners lost their right to purchase the subject lots.

It cannot, therefore, be said that Ayala Corporation breached petitioners right of first refusal and should be compelled by an action for specific performance to sell the subject lots to petitioners at the prevailing market price in 1984.

WHEREFORE, the instant petition is **DENIED**. No pronouncement as to costs.

SO ORDERED.

Puno, (Chairman), Austria-Martinez, Callejo, Sr., and *Chico-Nazario, JJ.,* concur.

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[1] Alternatively spelled Vasquez.

[2] *Rollo*, pp. 10-187 with Annexes.

[3] *Id.* at 193-210; Penned by Associate Justice Perlita J. Tria-Tirona and concurred in by Associate Justices Eugenio S. Labitoria and Eloy R. Bello, Jr.

[4] *Id.* at 74-79; Dated September 11, 1995.

[5] *Id.* at 193-198; Culled from the *Decision* of the Court of Appeals.

[6] *Id.* at 50-62.

[7] *Id.* at 206.

[8] *Id.* at 240-289.

[9] *Id.* at 53.

[10] Art. 1197. If the obligation does not fix a period, but from its nature and the circumstances it can be inferred that a period was intended, the courts may fix the duration thereof.

The courts shall also fix the duration of the period when it depends upon the will of the debtor.

In every case, the courts shall determine such period as may under the circumstances have been probably contemplated by the parties. Once fixed by the courts, the period cannot be changed by them.

[11] *Supra,* note 2 at 300-323.

[12] *Id.* at 324-325.

[13] *Id.* at 331-369.

[14] *Id.* at 370-433.

[15] Rosario *v*. Court of Appeals, 369 Phil. 729 (1999), citations omitted.

[16] *Supra,* note 2 at 401-402.

[17] RTC Records, pp. 60-61.

[18] *Id.* at 90-91

[19] *Id.* at 77.

[20] *Supra* note 2 at 53.

[21] *Id.* at 58-60.

[22] *Id.* at 52-53. The full text of paragraph 2 reads:

2. Purchase Price and Mode of Payment

The Purchase Price shall be FIFTY-SIX MILLION SIX HUNDRED TWENTY THREE THOUSAND THREE HUNDRED THIRTY EIGHT PESOS AND EIGHTY CENTAVOS (₱56,623,338.80) and shall be paid at the Closing by the BUYER by means of a managers check(s) payable to Ma. Luisa M. Vazquez in her own behalf and as representative of the other SELLERS, less the earnest money of EIGHT MILLION PESOS (₱8,000,000.00) herein paid as mentioned below; provided, however, that on or before the Closing, SELLERS shall deliver to the BUYER duly executed letters of instruction from the other SELLERS specifically authorizing Ma. Luisa M. Vazquez to receive on their own behalf their respective payments by means of a managers check for the entire Purchase Price stated in this Paragraph payable to SELLERS. In addition to the foregoing, BUYER shall be responsible for the payment of all billings of the contractor GP Construction & Development Corporation after the first billing and any payments made by the company and/or SELLERS shall be reimbursed by BUYER on closing which advances to date is ₱1,159,012.87.

Earnest money in the sum of EIGHT MILLION PESOS (₱8,000,000.00), Philippine Currency, shall be paid upon signing of this document.

[23] *Supra*, note 17 at 78.

[24] *Ibid.*

[25] *Supra,* note 17 at 69-76.

[26] *Id.* at 81-82.

[27] *Id.* at 32-38.

[28] *Supra*, note 2 at 55.

[29] BLACKS LAW DICTIONARY, Sixth Edition, p. 273.

[30] *Id.* at 809.

[31] TSN, November 18, 1993, pp. 35-36.

[32] TSN, August 3, 1993, pp. 17-19.

[33] 4 A. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES, 102 (1991).

[34] *Supra* note 10.

[35] *Supra*, note 17 at 651.

[36] *Id.* at 151.

[37] *Id.* at 154.

[38] *Supra*, note 36.

[39] *Supra*, note 37.

[40]*Supra*, note 17 at 157-158.

[41] *Id.* at 158.

[42] A. TOLENTINO, *op. cit. supra*, note 33 *citing* 2 Castan 528 and 3 Valverde 104.

[43] *Supra*, note 2 at 57.

[44] Litonjua *v*. L&R Corporation, 385 Phil. 538 (2000); Carceller *v*. Court of Appeals, 362 Phil. 332 (1999); Equatorial Realty Development, Inc. *v*. Mayfair Theater, Inc., 332 Phil. 525 (1996).

[45] Ang Yu Asuncion *v*. Court of Appeals, G.R. No. 109125, December 2, 1994, 238 SCRA 602.

[46] Art. 1469, Civil Code.

[47] A. TOLENTINO, *op. cit. supra,* note 33 at 465.

[48] *Supra,* note 2 at 63.

[49] *Id.* at 209-210.

The testimony of petitioner Daniel Vazquez on direct examination reads:

Q Mr. Witness, at the last hearing which was interrupted by the brown-out, we were on Exhibit L, which I am handing to you, upon receipt of Exhibit L which is the June 18, 1990 letter of Ayala to you, what did you do, if any?

A We contacted Ayala to tell them we wanted to exercise our option and that we were not agreeable with the price they are mentioning here, sir.

Q Did you offer any price?

A Yes, sir, we offered them a price.

Q According to the complaint, the price in April 1984 could have been only P460.00 pesos per square meter. Where did you get that price?

A One of our secretaries, Mr. Eusebio, I believe, contacted the Ayala Corporation and that was the price the Ayala Corporation was selling it at that time, sir.

Q Did the Ayala Corporation reduce this price for purposes of arriving in an agreeable or acceptable offer?

A Yes, sir, we did.

Q How much did the Ayala Corporation dropped to?

A Ayala dropped, if I remember right, to I think ₱4,000.00 pesos, sir.

Q And how about you?

A We increased our price to ₱2,000.00 pesos based on the selling price of Ayala at that time converted to dollars and reconverted to pesos at this later dates of 1991. (TSN dated April 20, 1993, pp. 3-5).